IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, Et Al., Appellants

v.

JUDITH JAVA, Et Al., Appellees

On Appeal From The United States District Court
For The Northern District Of California

BRIEF for the STATE OF NEW HAMPSHIRE AND the STATE OF TENNESSEE, AS AMICUS CURIAE

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INTEREST OF AMICUS

The State of New Hampshire, through its Department of Employment Security, administers as part of a National scheme a program paying unemployment compensation to those unemployed qualifying under N. H. RSA 282 which could be

profoundly affected by the Court's decision. The State of New Hampshire urges that this Court reverse the District Court's decision.

STATEMENT

A three-judge District Court sitting in the Northern District of California has granted a preliminary injunction finding "Calif. Unempl. Ins. Cde. s. 1335 defective on both constitutional and statutory grounds." The District Court found the case to be "indistinguishable" from the decision of this Court in *Goldberg* v. *Kelly,* 397 U.S. 254, as to due process considerations and that unemployment benefits were terminated in violation of 42 U.S.C. s. 503 (a) (1) which required that payments be made "when due."

ISSUES OF LAW

I. Does the California statute or method of administration violate 42 U.S.C. s. 503 (a) (1) which provides that in order for California to be certified by the Secretary of Labor and thereby receive administrative grants the California statute shall provide "such methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due;" ...?

II. Are the decisions of this Court in *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969) and *Goldberg* v. *Kelly, supra,* indistinguishable from the case at bar?

III. Does California by statute or by the administration of its unemployment compensation law deny procedural due process in violation of the Due Process Clause of the Fourteenth Amendment?

ARGUMENT

I.

THE CALIFORNIA STATUTE AND ITS ADMINISTRATION COMPLIES WITH 42 U. S. C. S. 503 (a) (1) WHICH PROVIDES THAT IN ORDER FOR CALIFORNIA TO BE CERTIFIED BY THE SECRETARY OF LABOR AND THEREBY RECEIVE ADMINISTRATIVE GRANTS THE CALIFORNIA STATUTES MUST PROVIDE "SUCH METHODS OF ADMINISTRATION . . . AS ARE FOUND BY THE SECRETARY OF LABOR TO BE REASONABLY CALCULATED TO INSURE FULL PAYMENT OF UNEMPLOYMENT COMPENSATION WHEN DUE;"

When the Social Security Act was passed in 1935 it represented a new principle of social insurance to the American public and to American law. The Depression had made it clear that the small communities lacked the fiscal organization and resources to meet the exigencies of mass unemployment on a charitable basis; and relief failed to stabilize consumer demand in the crucial incipient stages of a depression. In terms of the community values involved both the techniques of giving charity, particularly the "means" or "needs" test, and the psychological impact of receiving "charity," undermined the self-respect and independence of the unemployed. It was these economic and ethical deficiencies to which the unemployment compensation provisions of the act responded.

The ethical aspect of this new community response lay in the social insurance principle that payments be made to an eligible claimant as a matter of right and not on a subjective test of need. Supporters and opponents of the Social Security Act were agreed that in this principle was an essential difference between unemployment compensation and charity.[1]

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[1] *Steward Machine Co.* v. *Davis*, 301 U.S 548.

The social objective of unemployment compensation is achieved through the payment of benefits to eligible unemployed persons, and the success of the program depends upon an effective operation of the administrative process in promptly getting these payments out to those entitled to them. Persons who have worked in covered employment (for an employer liable to pay the tax) and have received wages during the base period equal to certain amounts specified in the law, have available for their benefit when unemployed under appropriate conditions a fixed amount related to the amount of wages received, against which they may after a waiting period draw solely on a week-to-week qualification basis as a matter of right without regard to their economic position.

This right to receive benefits is not absolute. It may be postponed if the unemployment is not involuntary within the meaning of the law. It may be entirely defeated, generally, if the person does not perform certain conditions precedent, register for work and report, if he is not able to work, or if, though able, he is not honestly looking for work (that is if he is not a bona fide member of industry's labor force), does not expose himself unequivocally to all the suitable job opportunities which may reasonably be expected to be found in the labor market. To determine how much he has to his credit, if any, and whether he has the immediate right to draw against this credit, is a function of the administrative process subject to review by the courts.

The Social Security Act places on the Secretary of Labor the duty to examine the law and administration of each state's unemployment compensation law and to determine whether the state in its methods for reaching these conclusions and in the conclusions themselves provides "such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due;"[3] If the state passes this test (and others not material to this case) certain benefits flow to the state and the

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[3] 42 U.S.C. s. 503 (a) (1).

employers doing business therein. ". . . the only consequence of the repeal or excessive amendment of the (state) statute or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses is that approval of the (state) law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing. S. 903 (b) (c)."[3]

The states are not compelled to abide by this requirement and failure results neither in the invalidity of the state act nor in vitiating the state's administrative system, but results in the withdrawal of the Secretary of Labor's approval and the end to employment security administrative grants to the state. *Steward Machine Co.* v. *Davis, supra.*

The conformity of particular statutory conditions and administrative approaches to the federal requirements depends upon the interpretation of the requirement by the Secretary of Labor who has the duty to enforce adherence to the federal standards. The Secretary of Labor in his decision in the 1955 conformity hearings against California took the position that his duties of enforcement require him to make certification determinations on the basis of his own interpretation of the federal standards. Supplemental Brief, appendix "E," pp. 3-4.

In view of the cryptic nature of the standard it is almost inconceivable that Congress could have intended the Secretary to be responsible for enforcing them but not to be responsible for interpreting them. The Secretary is not limited, in his power to deny or to revoke certification by the requirements of the federal standards. Some additional standards may be said to be implicit such as Constitutional requirements. The Secretary of Labor is probably limited only by judicial relief for "abuse of discretion."[4]

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[3] *Steward Machine Co.* v. *Davis, supra,* @ 594-595

[4] See *Parker, Administrative Law Problems in the Unemployment Insurance Program, 8 Vand. L. Rev.* 436, 440-441 (1955); *108 Cong. Rec.* 771, 87th Cong. 1st Sess. (1962) (memorandum of Rep. Brown).

The District Court has, in effect, reversed the Secretary of Labor's determination certifying that the California law and its administration did provide such methods as to be "reasonably calculated to insure full payment of unemployment compensation when due."

That the Secretary of Labor does not take his duty in this regard lightly and that his certification is by no means automatic or proforma is evidenced by the fact that in 1949 and again in 1955 conformity hearings were instituted against California.

The Secretary of Labor was not a party before the District Court. Does its judgment now require him, without an opportunity for hearing, to reverse his decision and find that the State of California is no longer entitled to the benefits previously granted to it? It appears that the District Court has usurped the power of the Secretary of Labor and has, in effect, found that he acted arbitrarily and capriciously in certifying the law and administration of the California unemployment compensation law despite the fact that the Secretary of Labor has considered this method of administration each year for a number of years and has found that it was "reasonably calculated to insure full payment of unemployment compensation when due."

The California practice does not fall by failure to meet the federal requirement, first, because such failure would not invalidate the practice, and second, the determination is for the Secretary of Labor in the first instance to make, and third, it is a method "reasonably calculated to insure full payment when due."

The administration of the unemployment compensation program is a state responsibility, and is accordingly, based upon 51 independent state and territorial systems linked by cooperative guidance from the Secretary of Labor. Each state, as well as the District of Columbia, has a law of its own making. Each state has exercised its sovereign right to adopt its own type of

administration, with the result that there is considerable diversity among the states in the composition of their administrative agencies and in the composition and procedures of the impartial tribunals created for the adjudication of disputed claims.[5]

The District Court recognizes no test of reasonableness despite that requirement in the federal act. The term "reasonably calculated" should not be read out of the federal requirement. Such a term connotes that there are a variety of methods which will insure prompt payment. The statute does not require instantaneous guaranteed payment upon the issuance of an initial payable decision. The statute clearly indicates a prohibition against paying those who have not met the conditions precedent to eligibility. The District Court also ignores the statutory mandate that payment be made only "when due." Java was found, after a hearing which afforded her all the requirements of procedural and substantive due process, not to be one of those to whom unemployment compensation payments were due. She did not satisfy the conditions of entitlement which in effect delineate the risk which the law was designed to cover. These eligibility provisions limit the risk, in effect, to involuntary unemployment due to economic conditions. This was the Congressional understanding of "unemployment" and is supported in the legislative history of the Act.[6]

That Congress recognized there must be a time provided for appeal and hearing is evidenced by its passage of the unemployment act for the District of Columbia (Appendix B) in which it provided:

> "Benefits shall be denied or, if the claimant is otherwise eligible, paid promptly in accordance with such initial determination except as hereinafter otherwise provided. . . . If an appeal is duly filed with respect to

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[5] See N.H. RSA 282:5-B (2), Appendix A; District of Columbia Code s. 46-311 (b), Appendix B; and Tennessee Code, Title 50, Chapter 13, s. 50-1325, Appendix C.

[6] See S. Rep. No. 628, 74th Cong., 1st Sess. 11-12 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 8-7 (1935).

> a matter other than the weekly benefit amount or maximum duration of benefits payable, benefits with respect to the period prior to the final decision of the Board shall be paid only after such decision."

In providing an unemployment compensation law for the District of Columbia the Congress recognized that, unlike welfare, parties other than the potential recipient were involved and had rights. Employers also could appeal and were entitled to the same notice and opportunity for hearing before payment was made as the claimant before payment was finally denied.[7]

The insistence of the District Court that payments be made to an individual whose entitlement to unemployment compensation benefits is in issue, without regard to the employer's right or lack thereof, creates a chaotic condition impossible of reasonable administration to insure full payment of unemployment compensation when due.

Risk-delimiting conditions are almost as basic to unemployment compensation as is its ethical import, they have the impregnable virtues of venerability, necessity, and statutory sanction to secure them against so much as a suggestion of inconsistency with the federal standards. The states must delimit the risk to be covered by their laws so that only "unemployment" is included. Conditions precedent to eligibility serve that end and are not only permitted but to some degree affirmatively required by the act.[8]

II.

THE DECISIONS OF THIS COURT IN *SNIADACH* V. *FAMILY FINANCE CORP. (SUPRA)* AND *GOLDBERG* V. *KELLY (SUPRA)* ARE DISTINGUISHABLE FROM THE CASE AT BAR.

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[7] *Woodridge Nursery School* v. *Jessup*, 269 A. 2d 199 (1970).

[8] 73 Yale Law Journal 357.

The case of *Sniadach* v. *Family Finance Corp. (supra)* is clearly distinguishable. There was no question but what Sniadach had earned her wages from Miller Harris Instrument Co., her employer. Whether or not the wages were due was not in issue. No question was raised as to whether Miller Harris Instrument Co. owed her the wages. The question was should her wages, her property, be kept from her and held pending the settlement of whether she owed a third party a debt not associated with her wages and not related to whether or not she was entitled to the sum withheld. In fact Family Finance Corp.'s position was that the sum held did belong to Sniadach but that it should be held as security for her debt to it. In the instant case the matter awaiting decision was whether or not Java and Hudson were entitled to any sums. At the time of the hearing before the District Court it could not be said that either, neither or both had a right to unemployment compensation. It was not then known whether anything would ever be due Java or Hudson.

The case of *Goldberg* v. *Kelly (supra)* is no less difficult to distinguish from the case at bar. Vital to the Court's decision is its statement at page 261:

> " ' By hypothesis a welfare recipient is destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . "brutal need" without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.' *Kelly* v. *Wyman, 294 F. Supp. 893, 899, 900 (1968).*"

If there is one basic feature setting unemployment compensation apart from welfare it is the absence of this consideration.

The committee reports[9] on the Social Security Act, make clear that the absence of a "need" or "means" test as a condition precedent to eligibility was considered the single most

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[9] S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935); and Congressional debates 79 Cong. Rec. 5468 (1935) (remarks of Rep. Doughton).

characteristic feature distinguishing unemployment compensation from relief.[10] The requirement that payments be made only "with respect to unemployment" read in light of the principle of social insurance prohibits a "need" or "means" test. A payment predicated upon "need" or the satisfaction of a "means" test is made not with respect to "unemployment" but with respect to "needy unemployment." "Unemployment" plus need is an impermissible basis for payment. The Congressional purpose to eliminate the "means" test in itself distinguishes the *Goldberg* case and renders inappropriate and misleading the allegations of the Appellees which attempt to obfuscate the issue and give their case the color of similarity to the welfare cases considered by the Court in *Goldberg* v. *Kelly (supra)*.

Another basic difference between the program of Aid to Families with Dependent Children or New York State's Home Relief program and the unemployment compensation program is the parties involved. Determinations in the welfare field are between the public represented by the state agencies and its officials and the needy recipient. In unemployment compensation the parties not only include the public through the state government and the claimant but also the claimant's last or most recent employer who has rights of appeal and to be heard similar if not identical to the individuals claiming a right to unemployment compensation.

In the cases before the Court in *Goldberg* v. *Kelly (supra)* a final binding determination of entitlement had been made. No appeal or any other action was pending with regard to that determination. In the pending action it is their initial entitlement which was in issue. In the *Java and Hudson* case there had not been a final decision. The opposing party (the employer) had contested the claimants' basic right to entitlement *ab initio*. It was not whether entitlement continued but whether it existed at all. The existence of this additional interested party whose rights are also involved in the determination

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[10] 73 Yale Law Journal 377.

removes the case at bar from any semblance of similarity with the case of *Goldberg* v. *Kelly (supra)*.

In *Kelly* v. *Wyman (supra)*, @ 901, the Court pointed out that a high percentage of those appealing decisions denying benefits were found to be payable, i.e. 26% of the appellants were found entitled to welfare. This situation is drastically different in unemployment compensation programs; for example, in New Hampshire in 1968 less than 19% of the initial determinations denying benefits did the claimant appeal, in 1969 less than 18%. Employers in each of those years appealed only 1/10 of 1% of the determinations allowing the payment of unemployment compensation. All appeals amounted to less than 4% in 1968 and 3% in 1969. Of the small number of appeals by employers, benefits were denied in 80% of the cases each year while claimants were found entitled to benefits in only 19% of the cases they appealed.

This Court's decision in *Goldberg* v. *Kelly (supra)* should be no more controlling in this instant case than was this Court's decision in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) determinative of *Kirk* v. *Board of Regents*, ____Cal. App. 2d ____, 78 Cal. Reptr. 260 (1969), appeal dismissed 396 U.S. 554 (1970). In the *Shapiro* case, a one-year residency requirement as a condition precedent to eligibility for welfare was struck down as a violation of the equal protection clause of the 14th Amendment. The Court noted that the benefits in question were "the very means to subsist — food, shelter and other necessities of life." In the *Kirk* case, the Court upheld a one-year residency requirement for free tuition at the state university distinguishing *Shapiro* on the ground that *Shapiro* "involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children." No such basis underlies the concepts and/or payment of unemployment compensation which has always been distinguished from welfare.

Entitlement to unemployment compensation should not be held to create a vested property right before adjudication. In

this regard it is more similar to the award of disability benefits under the Social Security Act than welfare payments.[11]

III.

NEITHER BY STATUTE NOR THE METHOD OF ADMINISTERING ITS UNEMPLOYMENT COMPENSATION LAW DOES CALIFORNIA DENY PROCEDURAL DUE PROCESS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Java, Hudson and their respective employers all were entitled to and did receive a full and impartial hearing which satisfied every aspect of due process. They could introduce evidence, produce witnesses, cross-examine witnesses, testify or not as they chose, as well as present oral and/or written argument so that the tribunal could determine factually whether each individual claimant had a right to unemployment compensation. This impartial tribunal found Java did not have a right to unemployment compensation and that Hudson did. The single fact that the payment of unemployment compensation was stayed pending the determination of whether the right to it existed for six to seven weeks does not destroy California's guarantee of due process. That period in fact compares favorably with the delay of some four months which existed in *Goldberg* v. *Kelly*.

The State of California went even further than the due process or its statute's requirement. It paid to both Java and Hudson one or two checks before their entitlement was established and before any decision became final. California apparently took a calculated risk that because few employers raise objections to a claimant's entitlement it could make payments without regard to the employer's statutory rights and before he had an op-

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[11] See *Messer* v. *Finch*, 314 F. Supp. 511 (1970); *King* v. *Finch*, 428 F. 2d 709 (1970); *Dandridge* v. *Williams*, 397 U.S. 471.

portunity to raise any question of entitlement. In effect California said so few employers exercise their rights we will make a gift to those claimants who are later found not to have any right to unemployment compensation.

As Judge Frankfurter said in his concurring opinion: "Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, . . ."[13]

Most of the cases dealing with Due Process deal with one-sided situations, that is, a private individual or company or class standing in similar positions against the power of the state, and whether the requirements of the 14th Amendment were observed was examined from one view only. That is not the case here as there are rights of private parties, which are opposed to the alleged right to unemployment compensation, Java's employer and Hudson's employer. They are also entitled to the protection afforded by the 14th Amendment.

The statement by Justice Harlan, pp. 343, concurring opinion, *Sniadach* v. *Family Finance Corp., (supra)* aptly describes the situation of the employers and the state: "I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use."

The cases dealing with the denial of disability benefits under the Social Security Act are more nearly in point than are those dealing with welfare. In *King* v. *Finch, (supra)* the Court after discussing *Goldberg* v. *Kelly (supra)* and *Dandridge* v. *Williams (supra)* said: "Entitlement to these benefits has always been held not to create a vested property right before adjudication

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[13] *Hannah* v. *Larche*, 364 U.S. 420 @ 487.

or payment. *Flemming* v. *Nestor*, 1960, 363 U.S. 603." In *Messer* v. *Finch (supra)* an award of disability benefits under the Social Security Act was made. Messer received benefits, then the Secretary determined he was no longer eligible and payments were discontinued. Messer attacked this procedure relying on *Kelly* v. *Wyman (supra)*. The Court held that Messer was not denied due process as he had a right to judicial review and would if successful obtain retroactive benefits. This is precisely the position of both Java and Hudson.

In *Flemming* v. *Nestor (supra)* the Court concluded that a person covered by the Social Security Act "has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment." pp. 611. If an accrued interest could be defeated cannot payment be stayed pending determination of whether or not any right exists?

"The authorized procedure is not incapable of affording the protection to petitioners' rights required by due process."[13]

The OPA experience supports the basic principle that a trial type of hearing is not required except when adjudicative facts are in dispute. The foundation case is *Yakus* v. *United States (supra)*. The Emergency Price Control Act of 1942 authorized issuance of price orders without advance hearings, requiring only that the Administrator should, "so far as practicable, advise and consult with representative members of the industry. . . ." The main procedural protection came after instead of before issuance of a price order, through a provision for protests supported by "affidavits or other written evidence." The Administrator was authorized to grant or deny a protest in whole or in part, or notice it for hearing; he could and often did limit a protest proceeding to the filing of written materials. *Yakus* was a criminal prosecution for violation of price regula-

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[13] *Yakus* v. *United States*, 321 U. S. 414 @ 435 (1944).

tions which had not been challenged by the protection procedure.[14]

It seems that the District Court is saying that the government can take property, concerning which there is no question but that right, title and interest is vested in one of its citizens, from any of those citizens and await later judicial determination as to whether the government had the right to take that property (*Phillips* v. *Commissioner*, 583 U.S. 589 and cases cited) but cannot fail to pay unemployment compensation to one of its citizens without regard to the rights of another of its citizens before the entitlement to such compensation is determined.

Although the Court was dealing with due process under the 5th Amendment in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, its comments are appropriate in determining the respective

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[14] See also *In Bourjois, Inc.* v. *Chapman*, 301 U.S. 183 (1937). The Court declared of an application for registration of cosmetics that neither the state nor the federal Constitution "requires that there must be a hearing of the applicant before the board may exercise a judgment under the circumstances and of the character here involved," but the Court immediately went on to say that "the requirement of due process of law, is amply safeguarded" by a statutory provision for "appeal" to the superior court. Id. at 189. In *Columbia Auto Loan, Inc.* v. *Jordan*, 196 F. 2d 568 (D.C. Cir. 1952), a trial type of hearing was required on refusal to renew an insurance agent's license, but the requirement was satisfied by a de novo judicial review. In *Brooks* v. *Laws*, 208 F. 2d 18 (D.C. Cir. 1953), the court denied to an applicant for admission to the bar permission to bring mandamus, on the primary ground that a case or controversy was not presented. The court rejected a contention that the applicant had been denied hearing, partly because the applicant "had a full hearing before the Committee." Id. at 30. The court then declared that "the whole purport of admission to the bar in this country . . . is that the Committee and the court can inquire into the applicant's character by confidential inquiry. . . ." Ibid. Judge Edgerton, concurring in the result, declared: Elementary fairness and therefore due process of law forbid finally rejecting, on grounds of character, an otherwise qualified applicant without allowing him a public opportunity to confront his accusers and refute their charges.

rights of the three parties in this action. "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. . . ." pp. 894.

And p. 895: . . . " 'Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is ' compounded of history, reason, the past course of decisions. . . .' *Joint Anti-Facist Comm.* v. *McGrath*, 341 U.S. 123, 162-163 (concurring opinion)."

And p. 895: "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

This is not the first time the Court has considered the constitutionality of paying unemployment compensation before hearing and without a final decision as to the potential recipient's entitlement. In *Pa. State Ch. of Commerce* v. *Torquato*, 125 A. 2d 755, cert. denied 352 U.S. 1024, the Pennsylvania court in a well-reasoned opinion found certain provisions of the Pennsylvania statutes unconstitutional as being in violation of the due process requirements of the 14th Amendment of the Constitution of the United States and of the Constitution of Pennsylvania. That case arose by reason of claims of unemployment compensation filed by former employees of Westinghouse Electric Corporation. The Pennsylvania Act provided that the Department must give notice to both the claimant and the employer concerning claimant's eligibility, and if eligible the weekly rate and maximum amount of compensation payable. The Department then is required to determine whether the claim is valid. Any such determination, unless either the claimant or the employer files an appeal with the Unemployment Compensation Board of Review within ten calendar days after the delivery of such notice, shall be final and compensation paid or denied in accordance with that determination.

"Procedural due process is accorded to both the employer and the claimant in the above mentioned administrative procedures." p. 760.

The act, however, went on to provide that when the board affirms a decision of a referee or of the department allowing compensation, such compensation shall be paid notwithstanding any further appeal; and that when a referee affirms a decision of the department allowing compensation, in the event of a further appeal to the board, such compensation shall be paid after a period of thirty days from the date of such further appeal if the board has not rendered a decision prior thereto. This proviso is clearly to the effect that compensation is immediately payable upon the affirmance of the Board; and is further payable within thirty days after the Referee affirms the decision of the Department awarding compensation if the Board does not take action within thirty days. This clause requires that payments be made forthwith without regard to judicial review when there are two findings in favor of claimants. The act went on to provide that an aggrieved party may appeal to the Superior Court but such an appeal would not act as a supersedeas. Therefore compensation would be payable notwithstanding any appeal to the Superior Court. The Court noted at p. 762:

> "It is, of course, apparent that where the Board orders the payment of unemployment benefits, the Fund must be depleted to the extent of the payments pending the determination of the legal questions in the Superior Court, as would also the credit balance in an employer's reserve account. These payments having been made, the question as to whether or not the claimants-employees are eligible to these benefits actually would be moot as to the payments already made when the case reaches the Superior Court.
>
> "We do not believe that it is consistent with due process of law to require the payment of claims during the very period of time when the eligibility of the claimants for unemployment compensation is being litigated. To do so, in effect, is to permit the administrative officials for all practical purposes to make a final determination without

any adequate means for effective judicial review. We believe that substantial requirements of due process dictate that the status quo as to these payments be preserved until the Court which has statutory jurisdiction to determine the validity of these claims passes upon the legal questions involved.

"We agree with the lower Court that the statutory provisions requiring payment of unemployment compensation prior to judicial review and prohibiting an appeal to the (Superior) Court from acting as a supersedeas, violate the due process clause of the Constitution of the United States: *Porter, Auditor* v. *Investors Syndicate,* 286 U.S. 461, 471; *Aircraft & Diesel Equipment Corp.* v. *Hirsch et al.,* 331 U.S. 752, 773; *Pacific Telephone & Telegraph Co.* v. *Kuykendall,* 265 U.S. 196, 201, 205; *Oklahoma Natural Gas Co.* v. *Corporation Commission,* 261 U.S. 290; *Chicago, Milwaukee and St. Paul Railway Co.* v. *Minnesota,* 134 U.S. 418, 456, 457; *Chrysler Corp.* v. *Appeal Board of Michigan Unemployment Compensation Commission,* 3 N.W. 2d 302 (1942); *State ex rel. Campbell* v. *State et al.,* 57 N.E. 2d 433 (Supreme Court of Indiana, 1944); *Dallas Fuel Co.* v. *Horne et al.,* 300 N.W. 303 (Supreme Court of Iowa, 1941)."[15]

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[15] In *Porter, Auditor* v. *Investors Syndicate,* 286 U.S. supra, the Court said (pages 470, 471): "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 454. But where either the plain provisions of the statute *(Pacific Tel. Co.* v. *Kuykendall,* 265 U.S. 196, 203, 204) or the decisions of the state courts interpreting the act *(Oklahoma Nat. Gas Co.* v. *Russell,* 261 U.S. 290) preclude a supersedeas or stay until the legislative process is com-

The Court held @ p. 765: "It is clear from the foregoing cases, particularly the above quoted and cited cases of the Supreme Court of the United States, that a statutory provision which directs that unemployment compensation in large amounts shall be made to claimants before the validity of their claims to such payments are or may be determined by a Court – in this case the Superior Court of Pennsylvania – is a violation of the due process of law requirements of s. 1 of the Fourteenth Amendment of the Constitution of the United States and also of s. 9 of Article I of the Constitution of Pennsylvania."

The Court in answering the claim that a stay in the payment of benefits would cause hardship and distress and that they would suffer by prolonged litigation even if their claims are decided to be just, said @ p. 767:

> "Although it is indisputable that the law's delays almost always cause successful litigants severe economic hardship, the answer is not to short circuit or violate the Constitution, but to expedite (by speed-up or elimination or otherwise) administrative procedure and the time for appeals. This can be further expedited by a test case.

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pleted by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

In *Chrysler Corp.* v. *Smith*, 298 N.W. 87, the Court said (p. 92): "Claimants invoked that part of s. 34 of the act, reading: 'Provided, That if the final decision of a referee affirms the initial or an amended determination, or the appeal board affirms the final decision of a referee, allowing benefits, such benefits, shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's experience record shall be charged with benefits so paid.'

"This, if held applicable in the instance at bar, would render administrative action superior to recognized judicial power in the premises and constitute the provisions relative to appeal and court procedure a nullity. If construed, as applicable in this instance, it would render due process of law, expressly recognized and provided for in the (administrative provisions of the) act, nugatory and a senseless gesture."

> "The special injunctive decree issued by the lower Court maintains the status quo and protects and preserves the rights of all the parties, plaintiffs and defendants alike, until each claim for unemployment compensation is decided by the Superior Court on its merits and in accordance with the applicable principles of law. That decree, we repeat, protects the Fund but does not bar any employe from presenting a valid claim for unemployment compensation and having such claim decided specifically or by appropriate ruling by the Superior Court. This was fair and proper, clear and just."

The Kentucky Court of Appeal also considered this same question in *Babb* v. *Bullitt,* 220 S.W. 2d 394, in which case the question was whether or not, under the provisions of the Unemployment Compensation Act, KRS 341.010 et seq., a claimant may be separated from or may voluntarily leave employment, without good cause, accept employment elsewhere, and force payment out of the reserve account of the previous employer without giving to that previous employer the right to protest such payment. The Court noted @ p. 395 that:

> "In such an instance, the taking of the employer's money has no reasonable or any relationship to the public weal or to the general welfare, and is in fact and effect the taking of money of one private individual by the legislature under the guise of a tax and transferring it to another without compensation. Such legislation to such extent is unconstitutional and invalid."

and at 398:

> " (I)f employers generally are so related to the unemployment problem that they can be required by a moderate tax to pay into a fund to be administered for the benefit of the unemployed, that it necessarily follows that they are not so

unrelated to the problem as to permit an indiscriminate payment of benefits out of the reserve solely created and maintained by that employer, without any right to protest or be heard."

The most recent case involving the employer's equal rights to due process arose under an act of Congress, the unemployment compensation law for the District of Columbia, in which the Court held that one of the purposes of the Act was to protect the rights of both parties by insuring fairness to the employer as well as the claimant in the administrative process. *Woodridge Nursery School* v. *Jessup, (supra).*

SUMMARY OF ARGUMENT

I. The Secretary of Labor has found that the California administrative procedure does comply with the Federal act. This determination is entitled to great weight. In fact his determination is correct.

II. Both Java and Hudson did have available to them proper administrative procedures guaranteeing them due process of law.

III. The employers are also entitled to due process of law which would be denied to them were the Court to uphold the District Court's decision.

CONCLUSION

For the reasons stated this Court should reverse the decision of the District Court.

Dated December 10, 1970.

Respectfully submitted,

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A copy of this Amicus Curiae Brief has been sent by prepaid airmail to all the parties.

Appendix A

New Hampshire Unemployment Compensation Law, Revised Statutes Annotated, Chapter 282:5-B (2)

(2) Determination. A determination shall be a decision by the certifying officer on a claim and shall be made, except as otherwise specifically provided in this chapter, as follows:

(a) A determination on the first claim in a benefit year and not immediately followed by a claim for waiting-period credit shall include: the annual earnings in the base period with the name of each employer reporting wages paid to the claimant, and the amount thereof, the maximum benefits then available, the maximum weekly benefit amount and the maximum duration thereof, and shall be mailed to the claimant.

(b) A determination on the first claim in a benefit year which is immediately followed by a claim for waiting-period credit shall be made promptly following the waiting period and shall include: the maximum benefits then available, the maximum weekly benefit amount and maximum duration thereof, whether or not, with the reasons therefor, the claimant will be payable for the week immediately following the waiting period and for consecutive weeks thereafter for which claims are filed (no other facts appearing to the contrary during such period), and identification of the employer whose account will be charged with benefits to be paid by reason of such determination. This determination shall in any case be mailed to all interested parties.

(c) A determination on an initial claim for total or partial benefits for any week except as in (a) and (b) above shall include: the maximum benefits then available, the maximum weekly benefit amount and maximum duration thereof, whether or not, with the reasons therefor, the claimant is payable for such week and for consecutive weeks thereafter for which claims are filed (no other facts appearing to the

contrary during such period), and identification of the employer whose account will be charged with benefits to be paid by reason of such determination. This determination shall in every case be mailed to all interested parties except the claimant where the determination is that he is payable.

(d) A determination shall be made by a certifying officer on any claim for benefits, though not an initial claim, where, in his judgment, there appears an issue relative to the entitlement of the claimant to benefits. The determination shall be in the manner provided in (c) immediately above and the interested parties shall be notified in the same manner.

(e) Nothing in this subsection shall be construed to require that a determination be made with respect to a claim for any week where the week follows immediately after a waiting period, or is one of any of the consecutive weeks for which benefits are paid immediately following such waiting period, or is one of any of the consecutive weeks for which benefits are paid immediately following the week with respect to which a determination is made under (2) (c) above except as provided in (2) (d) above.

(3) In finding the facts material to a claim, the certifying officer shall in every case where the reason for an individual's leaving employment may be material, send to the employing unit or employer for whom the claimant last performed services a request for information, such request to be in accordance with the regulations of the commissioner. When the information is not returned by such employing unit or employer as required by the regulations of the commissioner, the certifying officer shall proceed on the facts available to him and any benefits payable pursuant to such determination shall be charged to the account of the chargeable employer if he fails or refuses to return proper, factual information and even though the claimant is, by reason of some later decision, held not to be entitled to such benefits.

(4) A certifying officer may, within six months of any determination, for good cause reconsider his determination or any part thereof, provided there was no appeal taken from the determination. Such redetermination shall be made, and an appeal therefrom may be had, in the same manner as the original determination.

(5) Any claim or question involved therein may be referred by the certifying officer to an appeal tribunal, and such appeal tribunal shall make its decision with respect thereto in accordance with the procedure described in subsection C of this section.

(6) Any interested party may appeal from a certifying officer's determination by filing an appeal to an appeal tribunal within seven calendar days after the determination was mailed to his last known address. Provided, that if the commissioner finds sufficient grounds to justify or excuse a delay in filing an appeal, the time for filing said appeal may be extended by him.

(7) If no appeal from a determination by a certifying officer is taken within the time limits in (6) above such determination shall thereupon become final and benefits shall be paid or denied in accordance therewith, subject to the provision in (6) above relative to good cause for late filing of the appeal.

(8) A last employing unit or any employer whose account may become charged with benefits paid as a result of a determination by a certifying officer may waive, in proper form, in writing, his right to appeal from such determination prior to the making thereof, and in such case the determination shall become final upon the making thereof as to the issues involved, and benefits may be immediately paid pursuant thereto.

(9) Where an appeal has been duly filed the certifying officer's determination shall have no force or effect and benefits shall be paid or denied only in accordance with and subsequent to the decision of the appeal tribunal. Provided, however, that the certifying officer's determination shall continue to have effect as though no appeal had been filed with respect to all weeks of unemployment and any amount not affected by the appeal.

(10) Where an appeal tribunal affirms the determination of a certifying officer allowing benefits, such benefits shall be paid in accordance therewith without regard to any appeal to court under subsection G of this section, or reopening under subsection C of this section, up to the week in which such appeal to court is filed or request for reopening is received or the week in which reopening is directed when reopening is at the initiation of the commissioner, and the claimant shall be entitled to such benefits though the first decision of the appeal tribunal is later reversed, altered or in any way modified, and such benefits so paid shall be charged to the fund.

Appendix B

District of Columbia Unemployment Compensation Act, District of Columbia Code, 1961 Edition

Determination of Claims

Sec. 46-311. (a) Claims for benefits shall be made in accordance with such regulations as the Board may prescribe. Each employer shall post and maintain in places readily accessible to individuals in his service printed statements concerning such regulations or such other matters as the Board may by regulation prescribe. Each employer shall supply such individuals with copies of such printed statements or materials relating to claims for benefits as the Board may by regulation prescribe. Such printed statements or materials shall be supplied by the Board to each employer without cost to him.

(b) Promptly after an individual has filed a claim for benefits, an agent of the Board designated by it for such purpose shall make an initial determination with respect thereto which shall include a determination with respect to whether or not such benefit may be payable, and if payable, the week with respect to which payments will commence, the maximum duration thereof, and the weekly benefit amount, except that in any case in which the payment or denial of benefits will be determined by the provisions of section 46-310 (e), the agent shall promptly transmit such claim to an appeal tribunal which shall make a decision thereon after such investigation as it deems necessary, and after affording the parties opportunity for fair hearing in accordance with subsection (e) of this section, and the claimant and interested parties shall be given notice thereof and permitted to appeal therefrom to the Board and the courts as is provided in this chapter for notice of, and appeals from, decisions of appeal tribunals. An initial determination may, for good cause, be reconsidered. The claimant and other parties to the proceedings shall be promptly notified of the initial determination or any amended determination and the reasons therefor. Benefits shall be denied or, if the claimant is otherwise eligible, paid promptly in accordance with such initial deter-

mination except as hereinafter otherwise provided. The claimant or any party to the determination may file an appeal from such initial determination or from a reconsideration of such determination within ten days after notification thereof, or after the date such notification was mailed to his last-known address. If upon such initial determination benefits are allowed but the record of the case indicates that a disqualification has been alleged or may exist, benefits shall not be paid prior to the expiration of the period for appeal as hereinbefore provided. If an appeal is duly filed with respect to a matter other than the weekly benefit amount or maximum duration of benefits payable, benefits with respect to the period prior to the final decision of the Board shall be paid only after such decision: Provided, That if an appeal tribunal affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken. If, subsequent to such initial determination, benefits with respect to any week for which a claim has been filed are denied for reasons other than matters included in the initial determination, the claimant shall be promptly notified of the denial and the reasons therefor, and may appeal therefrom in accordance with the procedure herein described for appeals from initial determinations.

(c) To hear and decide appealed claims, the Board shall appoint one or more appeal tribunals to hold hearings in accordance with regulations prescribed by the Board at which all parties shall be given opportunity to present evidence and to be heard. In the conduct of such hearings, the parties shall not be bound by common law or statutory rules of evidence or other technical rules of procedure, but the appeal tribunal shall use due diligence to ascertain the true facts of the case.

Appendix C

State of Tennessee Employment Security Law, Title 50, Chapter 13, Tennessee Code 1955 Annotated

CLAIMS FOR BENEFITS AND APPELLATE PROCEDURE

Filing

Sec. 50-1325. A. Claims for benefits shall be made in accordance with such regulations as the commissioner may prescribe. Each employer shall post and maintain, in places readily accessible to individuals performing services for him, printed statements concerning benefit rights, claim for benefits and such other matters relating to administration of this chapter as the commissioner may by regulation prescribe. Each employer shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits when and if the commissioner may by regulation prescribe. Such printed statements and other materials shall be supplied by the commissioner to each employer without cost to the employer.

Initial Determination

B. A representative designated by the commissioner, and hereinafter referred to as a deputy, shall promptly examine the claim, and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim, or any question involved therein, to an appeals referee, who shall make his determination with respect thereto in accordance with the procedure described in subsection C of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of subsection D, Section 50-1324, the deputy shall promptly transmit his full findings of fact with respect to that subsection

to the commissioner, who, on the basis of the evidence submitted, and such additional evidence as he may require, shall affirm, modify or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection, which shall be deemed the decision of the deputy. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. The deputy may, for good cause, reconsider his decision and shall promptly notify the claimant and such other interested parties of his amended decision and the reasons therefor. Unless the claimant or any such interested party within ten (10) calendar days after delivery or mailing of such notification to the last known address of such claimant files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed benefits with respect to the period prior to the final determination of the board of review shall be paid only after such determination.

Provided, that if an appeals referee affirms a decision of the deputy, or the board of review affirms a decision of an appeals referee, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed no employer's account shall be charged with benefits so paid, and the claimant shall be charged with any benefits so paid, and, in the discretion of the commissioner, shall either be liable to have such payments deducted from any future benefits payable to him hereunder, and shall be liable to repay to the commissioner for the Unemployment Compensation Fund, a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided for in subsection B of Section 50-1329 for the collection of past due contributions.

As amended by Ch. 146, L. 1957.

C. Unless such appeal is withdrawn, an appeals referee after affording the parties reasonable opportunity for fair hearing, shall affirm, modify, or set aside the findings of fact and decision of the deputy. The parties shall be duly notified of such referee's decision, together with his reasons therefor, which shall be deemed to be the final decision of the board of review, unless within ten (10) days after the date of notification or mailing of such decision, further appeal is initiated pursuant to subsection E of this section. In the absence of an appeal to the board of review, the appeals referee may, within thirty (30) days after the date of notification or mailing of such decision, reconsider his decision and shall thereupon promptly notify the claimant and all interested parties of his reconsidered decision and the reasons therefor.